Filed 12/7/12 Senger v. Academy of Art University CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

NETALI SENGER, Plaintiff and Appellant, v. ACADEMY OF ART UNIVERSITY, Defendant and Respondent.	A134204 (San Francisco County Super. Ct. No. CGC-10-498941)

I. INTRODUCTION

Plaintiff Netali Senger appeals from summary judgment granted to the Stephens Institute, doing business as the Academy of Art University (the Academy), in this action for alleged solicitation to employment by misrepresentation (Lab. Code, § 970, subd. (a)), and unfair business practices (Bus. & Prof. Code, § 17200) arising from her employment as a dormitory Resident Advisor (RA) while attending the Academy.

We affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Going into the motion for summary judgment, Senger's allegations and evidence focused on claimed misrepresentations made to her by the Academy regarding the hours and duties of her work as an RA. As will be seen, that focus took a sharp turn once some discovery efforts on her part drove home a dormant problem that she had sued the wrong entity. However, we begin by briefly summarizing her evidence to that point, drawing largely from her deposition in July 2010.

Senger was an industrial design student at the Academy starting in 2005. She lived in campus residence halls (dorms) for a time, also split her time between the San Francisco campus and a job in Sacramento, and availed herself of some courses that were offered online. She was living in the Southern California suburb of Murrieta (often misspelled "Murietta" in the record) and working at an Indian gaming casino when, faced with trouble getting financing for education expenses, she decided to apply for an RA position at the Academy, which provided free room and board. She applied in June 2008, had a telephone interview with a resident director (RD), was accepted, moved into a dorm known as Howard Brodie Hall, where she would be assigned, attended a two-week training course, and then worked for most of the next two semesters (fall 2008 and spring 2009) as an RA.

Written information Senger received beforehand included a letter describing the job as "a demanding position" that required "at least 20 hours a week, which can consist of anything from duty shifts, programming, meetings, trainings, and working holidays/breaks." She found, however, that the hours and duties exceeded her expectations and caused stress. She had verbal warnings and then a disciplinary report later that fall and, she claimed, poor grades that caused her to withdraw from the job and school before the end of the second semester, on a day's notice without taking her finals, on a pretext of a "personal emergency." She had nevertheless reapplied to be an RA for the fall 2009 semester, but was ultimately rejected.

Senger filed this lawsuit against the Academy in April 2010. The Academy took Senger's deposition in late July 2010, and moved for summary judgment in April 2011.

The fact that Senger had worked the entire time for Campus Living Villages, a separate entity with whom the Academy had subcontracted since 2007, seems to have eluded Senger's counsel, Michael Guta, until late in the litigation, even though back in 2008, Senger had applied for her RA work on a form carrying "Campus Living Villages" in its caption, attended two weeks of training conducted by that entity, and received her disciplinary report in a document also identifying that entity in the caption. The Academy's answer filed in June 2010 also stated as a fifth affirmative defense:

"Defendant alleges that it did not employ Plaintiff[.]" What triggered Guta's realization were discovery efforts he made after the Academy's notice of motion for summary judgment. In early June 2011, objections to his notices of depositions for Jeannette Esteves, Danny Hall, Tricia Netion (misspelled "Nation"), and Dave Machado, all of whom were employees of Campus Living Villages, counsel for the Academy stated that "the named deponent is not a party or party affiliated witness and therefore must be subpoenaed to appear for deposition." A cover letter also explained that an employee satisfying Senger's request for a " 'person most knowledgeable' " at the Academy was temporarily unavailable and that, "The other deponents are not employees of the Academy and accordingly, as non-parties, must be served with a subpoena." After corresponding to express his incredulity about the non-employee status, Guta sought an extension of time to respond to the summary judgment motion; but the Academy, while stipulating to an extension of discovery,[1] would not agree to extend time for the response. The hearing had been set for June 30, and trial for August 1, 2011.

In opposition filed in mid-June 2011, Guta shifted his legal theory to be that the Academy had *misrepresented that it was Senger's employer*, and urged that this was a misrepresentation about terms and conditions of employment within Labor Code section 970, the same as the allegations made originally on the erroneous assumption that the Academy was the employer. Guta's opposition cited the continuance-for-discovery provision of the summary judgment statute (Code Civ. Proc., § 437c, subd. (h)), and urged that, since discovery had been thwarted by Campus Living Villages's absence from the suit, the court had to either deny summary judgment or grant a continuance for discovery. Guta did not include any declaration about the necessity, reason for delay, or expected fruits of further discovery. Nor does it appear that he moved to add Campus Living Villages as a Doe defendant.

---

[1] The Academy's "person most knowledgeable" proved to be Jennifer Dilley, not an employee of the Academy but another employee of Campus Living Villages. She was deposed on June 15, 2011, but limited to "policies and procedures" for RA's, apparently as the notice of deposition had requested.

In a declaration attached to the opposition, Senger cast her new misidentification claim this way: Sometime while living in the dorms from September 2005 through May 2007, an RA know to her only as "Art" told her he was employed by the Academy, and Senger "believed" she would be working for the same employer because she was told in a phone call "in the Spring of 2007 . . . by a person who identified herself as from the Academy that the duties as [RA] would remain the same as previous years." She was unaware that the Academy had contracted with Campus Living Village starting in 2007, and did not know that people supervising her work—Jeannette Esteves, Danny Hall and Tricia Netion—had been employees of that entity since Spring 2007, although she did know "we worked for the same employer." In her first semester as RA, in a dorm designated for female students only, Senger reported "to what [she] thought were [the Academy's] agents that a [female] student resident on[her] floor of the dorm was no longer going to her classes." Roommates told her that the student wandered the halls in an apparent drug-induced state and allowed an apparently homeless man to stay in the dorm. Nothing was done in response to Senger's report of "the problem," and she had "to monitor the halls on a 24 hour basis." She attributed "a communication problem in Campus Living Village's confirmation of the truant student's school attendance" to that organization being distinct from the Academy. Then in the Spring of 2009, a mail theft problem required her to personally deliver student mail. That duty, plus residents going to her when she was not on duty and a new duty of having to "clean up the streets" near the dorm, led to working 50 hours a week at the job. "Had I known that defendant had contracted its Housing department to a third party," she wrote, "I would have stayed in [Murrieta] and transferred to another school in 2008." She claimed harm in failed school courses, moving expenses, and a delayed graduation date.

As it did below, the Academy highlights evidence undermining some of those declared facts, but for purposes of deciding the issues presented on this appeal, there is no need to detail conflicts beyond those referred to later in this opinion.

The summary judgment hearing proceeded as scheduled before the Honorable Peter Busch, at the end of which the court adopted its tentative decision to grant summary

judgment. It found no triable issue of fact about the case as pleaded, found the newly-raised misidentification theory to be outside the pleadings, and found that the case was, in any event, barred by the one-year statute of limitations. The court also denied an oral request by Guta, raised for the first time at the hearing, for leave to amend the complaint.

III. DISCUSSION

A. *Summary Judgment Standards*

"A grant of summary judgment is proper where it appears no triable issues of material fact exist, and judgment is warranted as a matter of law. [Citations.] As the moving party, the defendant must show that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case' on one or more elements of the cause of action. [Citations.] The reviewing court independently examines the record and considers all of the evidence set forth in the moving and opposing papers except that as to which objections have been made and sustained. [Citations.]" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285.) Whether to review such evidentiary rulings de novo, or more deferentially for abuse of discretion, has recently been treated in part as an open question by our Supreme Court (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 [as to evidentiary objections "based on papers alone"]), but as will be seen, the evidentiary rulings in this case must be upheld under either standard.

The search for triable issues of *material* fact (Code Civ. Proc., § 437c, subd. (c)) is limited by *the pleadings*. "[T]he pleadings define the issues; thus ' "[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings." ' [Citations.]" (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885.) "A 'moving party need not ". . . refute liability on some theoretical possibility not included in the pleadings." [Citation.]' [Citation.] ' "[A] motion for summary judgment must be directed to the issues raised by the pleadings. The [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." [Citation.]' [Citations.]" (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342-1343.)

B. *Labor Code section 970 and Misrepresentations of Employer Identity*

Labor Code section 970 provides: "No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State . . . , for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either: [¶] (a) The kind, character, or existence of such works; [¶] (b) The length of time such work will last, or the compensation therefor; [¶] (c) The sanitary or housing conditions relating to or surrounding the work; [¶] (d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it . . . ."

Senger's complaint recites subdivisions (a) and (b), and alleges that she was induced, by "various misrepresentations to [her] regarding [her] duties and work hours," to move from her home to accept employment in San Francisco. The court found no triable issue of fact as to misrepresentations as to duties and work hours, and Senger disputes the ruling only to this extent: "[I]f there are no other triable issues of fact, . . . there are issues of fact regarding whether there were misrepresentations regarding who would be employing [her] as a Resident Advisor." The court below ruled that such an allegation was "outside the scope of the pleadings and, in any event, [did] not pertain to 'the kind, character or existence of such work' " (quoting Lab. Code, § 970, subd. (a)). Taking them in reverse order, we agree on both points.

The reach of the statute has been summarized this way: "Labor Code section 970 prevents employers from inducing employees to move to, from, or within California by misrepresenting the nature, length or physical conditions of employment. [Citation.] While it 'was enacted to protect migrant workers from the abuses heaped upon them by unscrupulous employers and potential employers, especially involving false promises made to induce migrant workers to move in the first instance,' the courts have construed sections 970 and 972 ([authorizing double damages in a civil suit)] to apply to other employment situations as well. [Citations.] . . . [I]n applying fundamental rules of statutory construction . . . consideration should be given to the statute's objective and remedial purpose. [Citation.] The apparent purpose of sections 970 and 972 is to protect

potential employees from being solicited to change employment by false representations concerning the nature or duration of employment. The statutory scheme is particularly addressed to preventing employers from inducing potential employees to move to a new locale based on misrepresentations of the nature of the employment. [Citation.]" (Italics omitted.) (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1522 (*Seubert*); *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 715-716.)

"The construction of a statute and whether it is applicable to a factual situation present solely questions of law" (*Seubert, supra,* 223 Cal.App.3d at p. 1522), and we agree with the court's view that a misrepresentation as to the identity of the employer, at least on these facts, did not fall within the ambit of the statute because it did not concern "[t]he kind, character or existence of such work" (§ 970, subd. (a)). There may be situations where an employer's knowingly false representations about its identity does concern the kind, character or existence of work, but not in this case. There are no allegations, for example, that Senger was first given information for each entity as to how her duties might *differ* working for each entity, and *then* was knowingly misinformed as to which one would be her employer so that her decision to move might be said to be influenced directly or indirectly.

It follows that such a claim is also, as the court recognized below, outside the pleadings. The allegations are that "various representations . . . regarding [Senger's] duties and work hours" were made, and Senger views any deficiencies in her pleading as ones that had to be raised by demurrer. Noting that the Academy did not file a demurrer, she cites case authority (improperly, without page point references) that, where no special or general demurrer has been raised before trial and a party raises such objection for the first time at trial, the pleading is construed liberally, with reasonable intendments indulged in its favor. (*Stilwell v. Trutanich* (1960) 178 Cal.App.2d 614, 617-618; *Gallagher v. California Pacific Title & Trust Co.* (1936) 13 Cal.App.2d 482, 486; *Bauer v. Neuzil* (1944) 66 Cal.App.2d Supp. 1020, 1023.) This authority, however, applies to trial, not summary judgment, and overlooks the fact that: "A motion for summary judgment necessarily includes a test of the sufficiency of the complaint and as such is in

legal effect a motion for judgment on the pleadings. [Citations.]" (*Barnett v. Delta Lines, Inc.* (1982) 137 Cal.App.3d 674, 682.)

Senger also assumes, apparently because the essence of any Labor Code section 970 claim is a *knowingly false representation* (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1391; *Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 155-156; *Aguilera v. Pirelli Armstrong Tire Corp.* (9th Cir. 2000) 223 F.3d 1010, 1019 (*Aguilera*)), that her misrepresented-identity theory is subject to the specificity rules of fraud pleading in California, but she argues that those rules should be relaxed because the true identity of her employer was something uniquely within the Academy's knowledge. We are unaware of any authority imposing the specificity rules on claims under Labor Code section 970 (compare *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46-47 (*Quelimane*) [rejecting their application to statutory claims of unfair business practices], with (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*) [applying them to fraudulent inducement of an employment contract]), and we are troubled that the parties do not brief that question.

But if they did apply, they would not be relaxed here for Senger's employer-misidentity claim. First, the rules apply to the essential *elements* of fraud or deceit,[2] and "the identity of the defendant is not an element of a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).) Second, while Senger

[2] Pleading fraud and deceit in California is ordinarily strict, so that a defendant knows what is being alleged. (*Quelimane, supra,* 19 Cal.4th at p. 47.) "[F]raud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus " 'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.' " [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' [Citation.] A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' [Citation.]" (*Lazar, supra,* 12 Cal.4th at p. 645 [concerning fraudulent inducement of an employment contract].)

claims that a *misrepresentation* of identity comprises a statutory element, there would still be no relaxation. "[I]n the pleading of fraud, the rule is relaxed when it is *apparent from the allegations* that the defendant necessarily possesses knowledge of the facts. [Citation.]" (Italics added.) (*Quelimane, supra*, 19 Cal.4th at p. 47.) The allegations in this complaint do not even raise the issue of misrepresented identity—or any *particular* representation—and thus cannot indicate that defendant had sole or superior knowledge of the subject. (See generally *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 217.) To relax the rule here, based on a complete absence of allegations, would reward vagueness in a circular fashion.

C. *Statute of Limitations*

We also uphold the court's alternative conclusion that, even if a misrepresentation of the employer's identity were actionable under Labor Code section 970 and properly pleaded, the claim is time-barred. The parties agree that the limitation period is one year. (*Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 980 ["because a representation is either 'knowingly false' (see [Lab. Code, § 970]) or not . . . , the one-year statute of limitations" applies]; cf. *Aguilera, supra*, 223 F.3d at p. 1018 [parties agreed]; Code Civ. Proc., § 340, subd. (a) "An action upon a statute for a penalty or forfeiture, if the action is given to an individual . . . , except if the statute imposing it prescribes a different limitation"].)

Senger advances two views on when the one-year period began running. One is that the period began only during discovery in this action; the other is that it began when her employment ended—in her words, when she was "constructively discharged." But like the court below, we reject both theories and find the action time-barred as to any claim of misrepresented employer identity because of Senger's chargeable knowledge.

"[S]tatutes of limitation do not begin to run until a cause of action accrues. [Citation.] [¶] Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' [Citations.] An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.

[Citations.] [¶] A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.]" (*Fox*, *supra*, 35 Cal.4th at pp. 806-807.) Courts use the term *elements* not in "a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Id*. at p. 807.) "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. . . . [P]laintiffs are charged with presumptive knowledge of an injury if they have ' " 'information of circumstance to put [them] on *inquiry*' " ' or if they have ' " '*the opportunity to obtain knowledge* from sources open to [their] investigation.' " ' [Citations.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Id*. at pp. 807-808, fn. omitted.)

Senger's theory of a "constructive termination" as triggering the statute rests on the *Aguilera* case, and is misplaced. The plaintiffs there had been hired as replacement workers during a strike and were later laid off in breach of a promise that they would be permanent workers and not replaced by returning strikers (*Aguilera*, *supra*, 223 F.3d at pp. 1012-1013); the court used their layoffs as the accrual date, finding the case analogous to breach of an implied contract not to terminate without good cause, where accrual would come with actual termination, not any earlier notice of the termination (*id*. at p. 1018). Termination is not part of Senger's cause of action. The fraud she claims is as to terms and conditions of employment or, as expanded in opposing summary judgment, a misrepresentation that the employer was the Academy rather than its subcontractor, Campus Living Villages.

The question of accrual therefore depends mainly on when Senger knew, or had reason to know, that her true employer was Campus Living Villages. Senger filed this action in April 2010, and notwithstanding her summary judgment position that she did not know until discovery that her employer was Campus Living Villages, undisputed

evidence was that, when she first applied for RA work in June 2008, she did so on an application form captioned: "Campus Living Villages Application for Employment." Then, in November of that same year, she received a report of unsatisfactory performance and was placed on probation. The report was captioned: "Employee Disciplinary Report Campus Living Villages." By the latter date, certainly, she had experienced the claimed changes from her job expectations of duties and hours, and was on notice that she might not be working for the Academy. She could have ascertained which entity was her employer. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875.) It is immaterial that her counsel would not notice until summary judgment in this action the Academy's affirmative defense that it did not employ Senger.[3]

And beyond *chargeable* knowledge, the court could also find *actual* knowledge. Senger's deposition, taken about a year before she offered her employer-misidentification claim, indicated at least indirectly, that she *did know*, from her August 2008 training, that she was employed by Campus Living Villages. Following discussion of the two-week training and the RD's who conducted it, the following exchange and context appear: "Q.

---

[3] Counsel included standard Doe defendant allegations in the complaint but never moved to amend so as to substitute Campus Living Villages as a true defendant. (Code Civ. Proc., § 474; *Winding Creek v. McGlashan* (1996) 44 Cal.App.4th 933 940-942.) Nor did counsel plead facts showing delayed discovery and accrual, or formally seek leave to do so. Plaintiff's counsel did move *orally*, at the summary judgment hearing on June 30, 2011, for leave to amend, but gave as his reason: "[W]e really didn't know that Campus Living Villages was a separate entity until we took the deposition of the representative, the person most knowledgeable of defendant, who it turned out was employed by Campus Living Villages and not the defendant, and that's when we find out on the record." (*Sic*.) Such an amendment, of course, would not have overcome the statute of limitations problem, and Senger does not claim abuse of discretion in that regard. Nor could she: "[L]eave to amend need not be granted if any possible amendment would inevitably be barred by the statute of limitations. 'The law neither does not requires idle acts.' (Civ. Code, § 3532.)" (*Cloud v. Northrup Grumman Corp.* (1998) 67 Cal.App.4th 995, 1011.)

Nor does Senger claim error in the reasoning behind this oral ruling by the court focused on procedural irregularity in the motion: "I'm not going to grant the oral request made at the hearing to amend. I don't think that's a proper procedural mechanism for that and raises all kinds of issues that shouldn't be handled that way."

. . . Do you have an understanding of what Campus Living Villages is? [¶] A. Yeah. [¶] Q. What is that? [¶] A. This is the company that took over the housing department and managed it for them. So they are the one that—From what I understand, they started when I started. That's when all the changes were made. *That's what I heard from everybody else, from all the other RAs, that this is a new company, and now they're doing things differently. Some of that was lectured to us and explained to us.* [¶] Q. Starting with the fall semester of 2008, there were changes because of Campus Living Villages? [¶] A. I think so. I wasn't there before, so I don't know. [¶] Q. Did anyone ever tell you that Campus Living Villages had been managing it prior to the fall of 2008? [¶] A. I don't remember, no. I don't know." (Italics added.)

We clearly draw from that excerpt that the new company, Campus Living Villages, had taken over and made changes, and: "Some of that was lectured to us and explained to us." Any ambiguity in her reference being "lectured" is resolved three pages earlier in the transcript: "Q. Who conducted the training? [¶] A. Different RDs had different *lectures* and different games, like each one of them, I guess, were responsible on some subjects." She also described the training as involving "some lectures" and "[i]ntroduction games," or as beginning each day with a "half-hour lecture." Also, that entire exchange was preceded by Senger admitting that she received a letter from Netion, before moving from Southern California, that invited her to contact Netion with "any questions regarding *your employment with Campus Living Villages*.' "

Senger's position in her declaration opposing summary judgment, nearly a year later, was inconsistent with that testimony. There is some arguably cagey language that dances around the central issue, for Senger stated that she did not know the Academy "*had entered into a contract*" with Campus Living Village, and "did not realize" that her RD supervisors "[had] been employees of an entity known as Campus Living Village *since the Spring of 2007*." (Italics added.) Still, she went on to state more directly, "I believed I was being employed by the school I had gone to for more than two years." She added, "I also believed *based upon a call in the Spring of 2007* to me by a person who identified herself as from the Academy that the duties as Resident Advisor would

remain the same as previous years" (italics added), which, again could just be artful language limited to her state of mind in 2007. But in any event, her deposition testimony clearly showed that *changes* resulting from the shift in management were "lectured to" and "explained to" her in August 2008, which was nearly a year and eight months before she filed suit.

The Academy argued below that these inconsistencies (and others) allowed the court, under *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21, to credit the deposition testimony over the later declaration. The record does not show whether the court did so, but we imply as much from its grant of summary based in part on the one-year statute. No error appears in that regard. (*Id.* at p. 22; *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 325; cf. *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482.)

The action is, as determined below, barred by the statute of limitations.

D. *Continuance for Discovery*

This leaves a related issue about the court's ruling sustaining objections by the Academy to six exhibits appended to a declaration by Senger's counsel. The court ruled that they were "not authenticated or admissible based solely on having been produced by [the Academy] during discovery."

Senger's briefing on this point is extremely superficial. It does not bother to describe each of the exhibits, which number about 50 pages of the appellant's appendix. Nor does it explain what they contained, except to broadly assert that their exclusion kept Senger "from pursuing a claim for misrepresentation of her employer's identity." Given the paltry briefing, it suffices to borrow this helpful summary from the Academy: "[Guta] submitted a declaration with [the] opposition to [the] summary judgment motion attaching as exhibits certain documents that had been produced by [the Academy] during discovery (Exhibits O, P, Q, R, S and U). . . . The attached exhibits included emails, an RA training schedule, a document entitled 'How to be on Duty,' [Senger's] resume and certain records regarding [her], an RA job description, State of California business entity 'details' for non-parties 'Academy of Art Foundation' and 'Campus Living LLC' (not the

Academy or Campus Living Villages . . .) and the unsigned, un-reviewed partial deposition transcript of Dilley. . . . The only 'authentication' [Guta] provided in the declaration was: 'Attached are true and correct copies of the following . . . .' "

"The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial," for an appellate court cannot presume error or prejudice. (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601; Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Evid. Code, § 354.) Without informing us in any meaningful way what the excluded exhibits contain, Senger fails to meet her burden of showing prejudice, even if she could show error. We must, and do, reject her contention on that basis alone.

Alternatively, she also fails to show error. She seems to concede that her counsel lacked personal knowledge to authenticate the documents, and offers no authority that—authentication aside—the unsigned and unreviewed deposition testimony by Gilley was admissible. Her sweeping and sole argument is that, since the Academy produced those documents in discovery, they are automatically deemed authenticated by operation of Evidence Code sections 1414 and 1420.[4] She is mistaken. Neither section treats all discovery produced by an opposing party as authenticated, and authentication is generally a question driven by the particular circumstances (Evid. Code, § 1400). "[T]he various means of authentication as set forth in Evidence Code sections 1410-1421 are not exclusive. Circumstantial evidence, content and location are all valid means of authentication. [Citations.]" (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.) Production of a document in discovery does not necessarily mean the producing party has "admitted its authenticity" or "acted upon" the document as authentic (Evid. Code, § 1414, subds. (a)-(b)); the question would depend on the discovery request and other

---

[4] "A writing may be authenticated by evidence that: [¶] (a) The party against whom it is offered has at any time admitted its authenticity; or [¶] (b) The writing has been acted upon as authentic by the party against whom it is offered." (Evid. Code, § 1414.)

"A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing." (Evid. Code, § 1420.)

circumstances, and Senger does not reveal any such circumstances. This is not apparently a case where, for example, the Academy used the same documents in support of its own summary judgment showing. (Cf. *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1527; see generally Evid. Code, § 1400.) Nor does Senger try to show that any of the documents were authenticating "responses" within the meaning of Evidence Code section 1420, which ordinarily concerns internal references in correspondence that show the identity of the sender. (E.g., *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1527.) The court below correctly rejected Senger's idea that these documents were "admissible based *solely* on having been produced by [the Academy] during discovery." (Italics added.)

Senger fails to show error, by any standard, or resulting prejudice.

E. *Continuance for Discovery*

Senger argues that we should reverse and remand for further discovery under subdivision (h) of Code of Civil Procedure section 437c (section 437c(h)) because, as argued in her opposition below, she was denied discovery by Campus Living Villages not being a party.

We reject this contention. The request for a continuance was made in opposition papers, without a showing by affidavit of: " '(1) the facts to be obtained are essential to opposing the motion; (2) . . . reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' " (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) It was not enough to simply raise the issue in her summary judgment opposition, without the showing by affidavit. (*Zamudio v. City and County of San Francisco* (1999) 70 Cal.App.4th 445, 454; *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1280.)

Even with hindsight perspective on appeal, Senger has difficulty articulating how discovery would enable her to resist summary judgment. She offers only that she "seeks to determine what [her] supervisors know of [her] working conditions," but it is not readily apparent how such evidence would assist her against the root problem of the statute of limitations, or any claim against the Academy as opposed to the non-party

Campus Living Villages. Another problem for her below would have been to show why the requested discovery was not accomplished earlier (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 76), and the record does not suggest any reason beyond neglect. The action was filed in April 2010; the Academy deposed Senger in July 2010; and as far as the record reveals, Senger made no discovery efforts until June 2011, weeks after the Academy noticed its motion for summary judgment. Not only is the delay apparently unexplained, but by the time of her informal request in her mid-June 2011 opposition, trial was set for August 1, with the hearing on summary judgment set for June 30, barely beyond the minimum 30 days required by statute. (Code Civ. Proc., § 437c, subd. (a); *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547-548.)

No abuse of discretion is shown in the court's implicit denial of a continuance under section 437c(h).

F. *Unfair Business Practice*

The Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) "prohibits unfair competition, including unlawful, unfair and fraudulent business acts. The UCL covers a wide range of conduct. It embraces ' " ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " [Citations.]' [Citation.] . . . [¶] Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. [Citation.] In addition under section 17200, 'a practice may be deemed unfair even if not specifically proscribed by some other law.' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Senger's allegations of unfair business practices simply incorporate by reference her allegations under Labor Code section 970, and thus are completely derivative, with no further or different wrong being alleged. It follows that the UCL claim falls with the Labor Code section 970 claim.[5]

[5] Because summary judgment was properly granted on both counts of Senger's complaint, there is no need to reach arguments about the propriety of punitive damages, an issue that the court below also did not reach.

IV. DISPOSITION

The judgment is affirmed.

_____
Haerle, Acting P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.